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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

JAMES E. BUCKLEY, ROBERT D. WALKER and HUGH NORWOOD, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable Chief Justice and Associate Chief Justices of the Supreme Court of the United States:

Your petitioners, James E. Buckley, Robert D. Walker and Hugh Norwood, Jr. (hereafter called defendants) respectfully pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT AND OPINION OF THE COURT BELOW

On June 13, 1967, the Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the Northern District of Illinois, sentencing each defendant to a term of one year imprisonment. The Court of Appeals opinion has not as yet been reported; it is printed herewith as Appendix "A".

JURISDICTIONAL STATEMENT

On a trial to a jury the defendants* were convicted of the theft of 3 Sears Silvertone television sets which were moving in interstate commerce in violation of Title 18, U. S. Code Section 659.

On review to the Court of Appeals for the Seventh Circuit, the judgment of conviction was affirmed by an opinion filed June 13, 1967. (Appendix "A")

A Petition for Rehearing was timely filed; it was denied on July 20, 1967. (Appendix "B")

The jurisdiction of this court is invoked under the provisions of Title 18, U.S. Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether, as a matter of law, the government was estopped from prosecuting the defendants because they were illegally entrapped.

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* One, Wesley K. Green was also convicted. His conviction was remanded for resentencing (Opinion, Appendix "A"); and he has not, as yet, processed any Petition to this court.

2. Whether the defendants could be found guilty of theft from interstate shipment where the shipment was interrupted by defendants' employer, at whose direction the merchandise was rerouted from its interstate movement to a place from which the television sets were taken.

STATUTES INVOLVED

Title 18, U. S. Code, Section 659, in pertinent part, is set out in Appendix "C".

STATEMENT OF THE CASE

The defendants were employed by Associated Truck Lines, Inc., Forest View, Illinois, as mechanic's helpers on truck maintenance for various number of years.

There was no proof that any of them had previously been engaged in criminal activity, nor was any predisposition to crime shown when the government had an opportunity to do so in rebuttal.

On the night of December 9, 1965, Milton Smazik, a supervisor of the Associated Truck Lines drove a truck-camper, to an address outside the Associated Truck Lines terminal, where he picked up two F.B.I. agents. (A. 3-4)

One, George Reinhofer, who worked for Associated for three years as a spotter and dock hand, had been contacted by the terminal manager and was told that there were some television sets, Ampex recorders and some spark plugs in a trailer, 30 feet by 8 feet (A. 11). There was no other property on the trailer. It was specially put there at the direction of the terminal manager.

The FBI agents testified they knew that the terminal manager, one Generis, had talked with Reinhofer in connection with the setting up of the television sets in a special place.

Defendant Norwood testified that he met Reinhofer in the employees' locker room on December 9 and Reinhofer asked if Norwood wanted a television set. Reinhofer importuned him for ten minutes to take a television set. Then Reinhofer told Norwood that he had to get rid of the sets because a buddy, who was working on the dock, would get in trouble if he did not. Reinhofer gave Norwood his keys and asked Norwood to put a television set in his car. Norwood then put a television set in Reinhofer's car. (A. 65) Reinhofer had been approaching Norwood ever since November 1, 1965 and would ask him two or three times a week to take television sets. It was only after Reinhofer said that his buddy was in trouble that Norwood agreed to take the set. (A. 65)

Defendant James Buckley came to work at 2:30 P.M., December 9, and quit at midnight. He received a telephone call at about 10:00 P.M. from Reinhofer who told him that he had everything set up and that the television sets he had been talking about were on a particular trailer, No. 7211. (A. 53)

The trailer was a city trailer, not a road trailer. (A. 54) Reinhofer kept asking him about television sets for a period of about six or seven weeks before then. (A. 54)

About midnight, Reinhofer asked Buckley if he got a television set; he told Reinhofer he did not. Reinhofer asked that the set be taken off the trailer, otherwise a buddy of his on the dock would get in trouble because he had left the TV sets there. Reinhofer moved the truck from under the light to a place of darkness. (A. 55)

Defendant Robert Walker similarly stated that Reinhofer had approached him for four or five weeks before December 9. On that date Reinhofer asked Walker if he

were interested in a portable television set. Walker said he did not want any part of it. (A. 60) Reinhofer told Walker that he would find a carton containing a television underneath a trailer on the ground, about three trailers in front of him. (A. 61) Reinhofer told him to be sure to move it because if not, the guys on the dock would get in trouble. He then placed a television set in the trunk of his car. (A. 60)

On rebuttal, Reinhofer admitted that he called the defendant Buckley at about 8:00 P.M. (A. 69) He told Buckley about some freight. Previously, the terminal manager had contacted him and he knew there was going to be certain merchandise on a truck. (A. 75) He had a friend who worked on the docks who had placed this merchandise on the truck. (A. 77) He could not disclose the name of the friend. (A. 77) He was working with the terminal manager Generis on this night. (A. 78)

He denied that he had talked to any of the three defendants before December 9 relative to the theft of television sets; and he denied he gave his car keys to Norwood.

As each of the defendants drove separately out of the yard, he was arrested by the F.B.I. agents conducting the surveillance.

There was no proof on government's rebuttal that defendants had ever stolen anything from the docks, or that they had ever previously been arrested.

During the government's case in chief, evidence was presented to the effect that the defendants, as well as other unnamed individuals, were suspected of thefts. (A. 34-35)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

The defendants were entrapped as a matter of law.

The activities of the terminal manager and his employee were such that they lured otherwise innocent individuals into a theft which, but for the set up, they would not have committed.

Although the Appeals Court found that "The record before us does not support a conclusion that otherwise innocent persons were induced to violate the law by trickery, persuasion, or fraud of any agents either of the government or of their own employer" (Opinion, Appendix "A"), the fact remains that the evidence shows that the defendants were "otherwise innocent persons."

When the defendants put into issue their defense of entrapment, the door was open wide for the government to put into the record any evidence—even hearsay—that led the employer, or the government to "suspect" the defendants. *Accardi* v. *United States,* 5 Cir., 257 F.2d 168, 171. On the contrary, the activities of the terminal manager and his dock employee, Reinhofer, clearly support the legal conclusion that defendants were lured unsuspectingly into a trap. The three television sets were moved from its regular trailer at the regular dock space to a special city trailer. (A. 11). Reinhofer moved the city truck from under the light to a place of darkness. (A. 65) Reinhofer even told one defendant, Walker, that a portable television was underneath a trailer on the ground. (A. 61) He also admitted making a telephone call to Buckley at about 8:00

P.M. telling Buckley that the merchandise would be on a trailer. (A. 69) The only defense testimony denied by government witness Reinhofer was to the effect that he had been after the defendants for weeks to take television sets and that they had refused him.

By these means, sanctioned, supervised and surveilled by F.B.I. agents, the defendants in law were entrapped. Entrapment is the conception and planning of an offense by an officer or other person and his procurement of its commission by one who might not have perpetrated it except for the trickery, persuasion or fraud of the entrapper. *Sorrels* v. *United States,* 289 U.S. 435.

Here, the defendants were never shown to have violated any law previously; nor shown to have committed any thefts, notwithstanding the employer's suspicion. No evidence was produced by the government to justify what the employer stated was its suspicions. Under the circumstances, the criminal design was not only originated by Reinhofer, agent and employee of the employer, but the employer set out specially to make the circumstances suitable for Reinhofer's inducements and blandishments. "There would be no such thing as entrapment unless a party had committed the offense charged." *Morei* v. *United States,* 6 Cir., 127 F.2d 827, 835.

Although the government had full opportunity, the defendants were not subjected to any searching inquiry into their own conduct or into any predisposition to criminality as bearing upon their claim of innocence. This could have been done, but was avoided by the government. In this respect, the opinion of the Seventh Circuit failed to follow the holding in *Sherman* v. *United States,* 356 U.S. 369, which stated, p. 372:

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime."

As in *Sherman*, entrapment here was established as a matter of law. The admonition in *Sherman* is pertinent here

> "The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the government to bring about conviction cannot be countenanced." (356 U.S. 380)

Even considered in a light most favorable to the government, the evidence and the reasonable inferences to be drawn therefrom, irresistibly demonstrate that Associate's terminal manager used dockhand Reinhofer to entrap unwarily innocent defendants.

II.

The District Court was without jurisdiction, the interstate character of the goods having been interrupted by the employer.

It is axiomatic that the statute in question, Title 18 U.S. Code, Section 659, cannot be invoked unless the goods "are a part of or which constitute an interstate or foreign shipment of freight or express."

The record demonstrates clearly that the three television sets, one of which was found in the possession of each of the defendants, was not moving in interstate commerce when they were taken.

Two of the sets were on a city truck, placed there specially by the terminal manager. (A. 11) They were not in a trailer that came in from the original shipper; nor were they on the dock of the freight yard awaiting interstate shipment; nor were they in a trailer awaiting interstate shipment. They were designedly taken from the interstate shipment, placed on a city truck for Reinhofer's special purposes. When, initially the city truck was placed under a light, Reinhofer moved the truck to another part of the yard in the dark (A. 65). There was nothing else on the truck except an Ampex Recorder and some sparkplugs.*

As to one of the television sets taken by Walker, it was not even in a truck. It was a portable television set under a trailer (A. 61). The record is unclear who placed the set under the truck—Reinhofer, or someone else.

Thus the record demonstrates that the three Sears Silvertone television sets in question here were no longer in interstate commerce when the terminal manager caused their placement either on the city truck or under a trailer, not for the purposes of inter-shipment out of the state, but for the single and only purpose that they be used as a lure and decoy for Reinhofer's inducements and blandishments. *O'Kelley* v. *United States*, 8 Cir., 116 F.2d 966. Accordingly, the district court was without jurisdiction to enter judgment on the verdict, and defendants' motions for acquittal should have been allowed.

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* These items were taken by one Wesley K. Green whose conviction was remanded for resentencing only. (Opinion, Appendix "A")

This case raises important questions of when an interstate shipment ceases its interstate character so as to divest the federal courts of jurisdiction.

CONCLUSION

For the foregoing reasons we pray that this court may issue its Writ of Certiorari to review the judgments entered below.

Respectfully submitted,

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